IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ERIC M. PEAGLER,
Petitioner,

vs

CIVIL ACTION NO. 2:07cv703-MHT

UNITED STATES OF AMERICA,
Respondent.
_____/

PETITIONER'S RESPONSE TO THE COURT'S ORDER
OF SEPTEMBER 7, 2007

COMES NOW, the Petitioner, Eric M. Peagler, pro se, respectfully showing cause why his 28 U.S.C. § 2255 motion should not be dismissed as it "was" filed within the one-year period of limitation established by the AEDPA, and every lawyer should have known that. See Magwood v. Jones, 472 F.Supp.2d 1333, 1337 (M.D. Ala. 2007).

Since, the Assistant U.S. Attorney has made a strong attempt to delay or mislead this Honorable Court. Fundamentally Petitioner ask that this Honorable Court consider these attempts to delay or mislead the Court on the point and authorities raised in the 28 U.S.C. § 2255 as an admission of the correctness of Petitioner's argument.

On November 12, 2002, Petitioner was sentenced and his original judgment of conviction was filed on November 22, 2002. Maderos v. United States, 218 F.3d 1252, 1253 (11th

Cir. 2000)(noting, in § 2255 cases where no appeal was filed, that judgment become final "ten (10) days after it was entered," citing F.R.A.P. 4(b)(1)). On December 1, 2005, pursuant to an agreement, the Government moved for a twelve (12) month sentence reduction for substantial assistance. (See Dkt. # 292). The motion was granted. On December 6, 2005, Petitioner was sentenced to 168 months in prison. Petitioner was not represented in this criminal proceeding. At the sentencing, the Court was not made aware of the reduction agreement that had been argeed upon between Petitioner and the Government. Therefore, as required by Rule 4(b)(1) Petitioner timely filed "Notice of Appeal." See United States v. Scott, 124 F.3d 1328, 29-30 (10th Cir. 1997)(holding that a prisoner's motion to vacate was not successive where his first motion to vacate resulted in resentencing and reinstatement of his right to direct appeal).

On October 11, 2006, after learning his issue was an argument of ineffective assistance of counsel, not a court error for direct appeal, Petitioner respectfully ask the United States Court of Appeals for the Eleventh Circuit to dismiss his appeal. The Appeals Court granted the request and issue a mandate on November 6, 2006, beginning the one-year period of limitation from "the date on which the judgment of conviction became final." (See Appeal No. 06-11334-GG).

The issue presented in this case is whether the statute of limitation for a habeas petition challenging a resentencing court's judgment begins to run from the date of the judgment

of the resentencing hearing, or whether the limitation period should relate back to the date of the judgment of the original ccnviction. The plain meaning of the statute supports the conclusion that the statute cf limitation runs from the date of the resentencing judgment and not the date of the orignal judgment. Under the AEDPA, the statute of limitations is calculated from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The judgment Petitioner seeks to challenge is the judgment at resentencing. The statute of limitation therefore began to run on November 6, 2006, the date the mandate became final by the conclusion of direct review. See Hepburn v. Moore, 215 F.3d 1208, 1209 (11th Cir. 2000)(per curiam)("Every circuit that has addressed the issue has agreed that, under the AEDPA, when new claims orginate at resentencing, those claims may be brought in a subsequent habeas petition without the necessity of obtaining permission from the circuit court before filing the petition."); In re Taylor, 171 F.3d 185, 187-88 (4th Cir. 1999)(section 2255 motion was not "second or successive" when it raised claims that originated at resentencing); Esposito v. United States, 135 F.3d 111, 113 (2nd Cir. 1997)(per curiam)(section 2255 motion challenging resentencing was only second or successive "to the extent that it challenge[d] the underlying conviction or seeks to vacate any commponent of the original sentence that was not amended" (quoting Galtieri v. United States, 128 F.3d 33, 38 (2nd Cir. 1997))); Walker v.

Roth, 133 F.3d 454, 455 (7th Cir. 1997)(per curiam)("We hold that a second habeas petition attacking for the first time the constitutionality of a newly imposed sentence is not a second or successive petition."); United States v. Scott, supra at 1330 (allowing § 2255 motion to challenge ineffective assistance of counsel at resentencing); see also Dahler v. United States, 259 F.3d 763, 765 (7th Cir. 2001); United States v. Barrett, 178 F.3d 34, 43-44 (1st Cir. 1999)(noting that "decisions have crated an exception . . . when the second petition challenges parts of the judgment that arose as the result of the success of an earlier petition" and noting that that exception did not apply); Luckett v. McDaniel, No. 99-15044, 2000 WL 340124, at *1 (9th Cir. Mar. 28, 2000)(unpublished)(same). By contrast, no circuit that has addressed the issue has held that a § 2255 motion or a habeas petition that addresses an issue that originates at resentencing is a second or successive petition.

In the instant case, Petitioner is contesting issues that originated at his resentencing. Petitioner's motion alleges that counsel rendered ineffective assistance at resentencing.

WHEREFORE, based on the foregoing, Petitioner's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255 is timely. The Eleventh Circuit has concluded that, under AEDPA, habeas petitions challenging the constitutionality of a resentencing proceeding are not successive to petitions that challenge the underlying conviction and original sentence. In re Green, 215 F.3d 1195,

1196 (11th Cir. 2000)(per curiam); see also 2 Hertz & Liebman, Federal Habeas Corpus Practice & Procedure § 28.3b(i), at 1412 (5th ed. 2005)("When a petitioner files a second or subsequent petition to challenge a criminal judgment other than the one attacked in an earlier petition, it cannot be said that the two petitions are 'successive.'").

DATED: This 17 day of September, 2007.

Respectfully Submitted,

Eric M. Peagler
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P.O. Box 5000
Yazoo City, MS 39194

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the foregoing Response to the Court Order of September 7, 2007, to: A. Clark Morris
Assistant U.S. Attorney
131 Clayton Street
Montgomery, Alabama 36104

on this 17 day of September, 2007.

Eric M. Peagler

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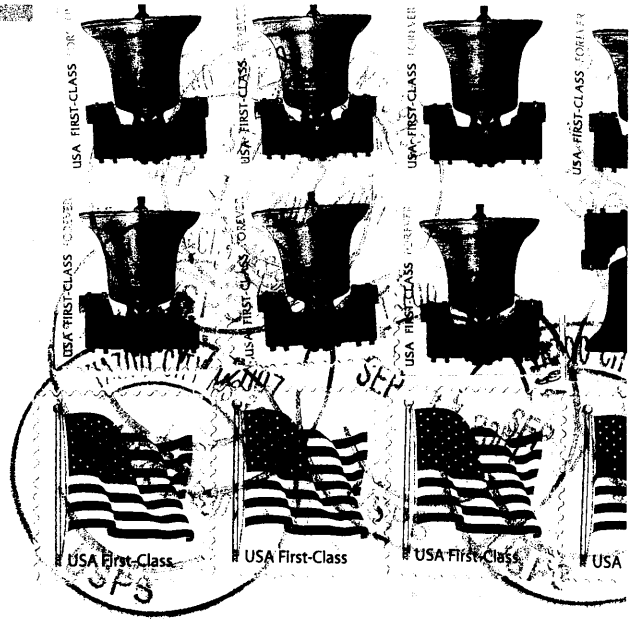
LEGAL MAIL



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